

Legal Capability

Introduction

The notion 'legal capability' has emerged quite recently as a way of thinking about what we are trying to achieve with PLE. It draws on our own and others work on PLE and has been strongly influenced by work on financial capability.

Legal capability can be defined as the abilities that a person needs to deal effectively with law-related issues. These capabilities fall into three areas: knowledge, skills and attitudes, emphasising that capability needs to go beyond knowledge of the law, to encompass skills like the ability to communicate plus attitudes like confidence and determination.

The concept of legal capability is explicitly about empowerment, looking at the abilities people need in order to deal effectively with law-related issues.

It provides us with a powerful conceptual model to identify gaps and deficiencies in capability to guide the production of PLE resources to fill those gaps.

Origins of legal capability

The capabilities approach has its roots in the work of Nobel prize winning welfare economist Amartya Sen¹. Developed from 1980 onwards the approach emphasises functional capabilities or 'substantive freedoms', looking at what human beings need to be able to do or be to effectively assert choices over their own well-being.

More recently the Financial Services Authority's work on financial capability has substantially developed the approach. Parallel work in the legal and consumer sectors has produced similar conclusions.

The Pleas Task Force report², published in July 2007, made frequent use of the term 'capability'.

'Public Legal Education is the tool we need to achieve legal capability. It has a key role in helping citizens to understand the law and to use it more effectively in their daily lives, bringing many different individual and social benefits. PLE is the missing element in the creation of the legally-enabled citizen.'

Other reports have emphasised the need for citizens to develop skills in order to deal with law related problems.

The executive summary of ASA Advicenow's Self Help Project³ (2004) stated:

'The project highlighted the existence of a knowledge and skills gap - many people don't have the knowledge of how to go about dealing with a legal problem, and lack the basic skills needed to do so... Self help materials must address the skills needed to deal with problems. Skills such as working out what your problem is, what result you want, how to find help, simple recording skills, managing correspondence, confidence, assertiveness and negotiating skills.'

¹ For further reading see Sen 'The Idea of Justice' (2009)

² Pleas Task Force report - July 2007 - paragraph 15.

³ Self Help project - <http://www.advicenow.org.uk/about-us/self-help-project-evaluation.10049.FP.html>

This emphasis on skills is echoed in work on consumer education by the Office of Fair Trading. The OFT's Consumer education: a strategy and framework⁴ 2004 consistently emphasises skills ahead of knowledge.

'The strategic aim is to... give consumers the skills and knowledge to function confidently, effectively and responsibly when buying goods and services.'

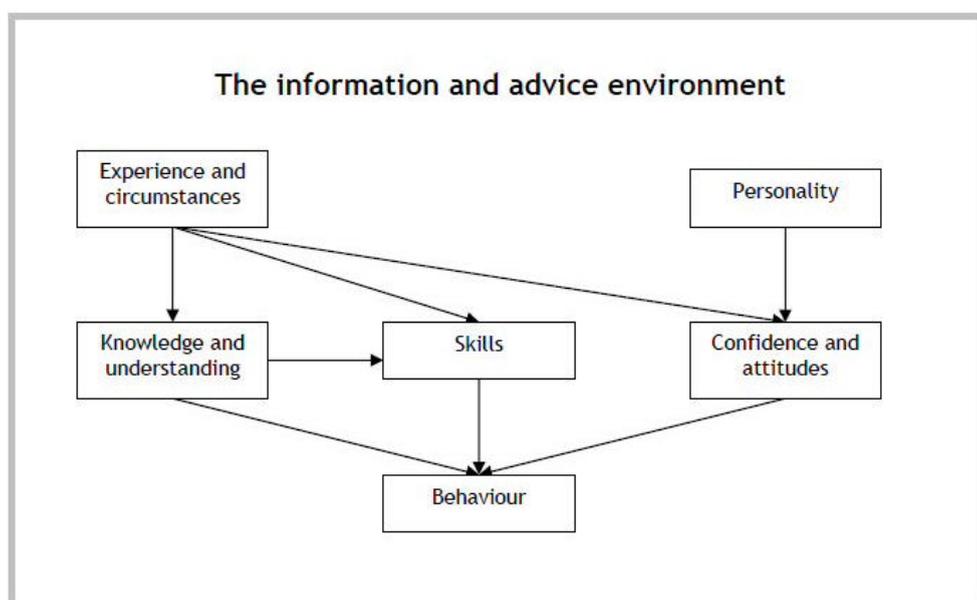
Financial Capability

The FSA launched its initiative to develop and implement a national strategy for financial capability in 2003. It commissioned the Personal Finance Research Centre at Bristol University to carry out an exploratory study to design a baseline questionnaire to measure levels of financial capability in the UK.

This study undertook a literature review to develop a model of capability and used focus groups to test this model and explore people's perceptions of financial capability. It drew on the Adult Financial Capability Framework⁵ developed by the Basic Skills Agency and the FSA in 2004 and looked at a range of other sources.

The result was a conceptual model based on Knowledge, Skills and Attitudes.

Further work looked at the way these capabilities are influenced by experience, circumstances and by personality and the resulting patterns of behaviour.



This model was tested at a seminar of professionals and with focus groups made up of members of the public. The focus groups found it difficult to conceptualise capabilities, for example finding it hard to distinguish between knowledge and skills.

Instead they saw capability in behavioural terms - not the abilities people bring to financial issues but what they are able to do as a result.

This different perspective of what people should be able to do was then used as framework of the baseline questionnaire, divided into four areas or domains,

⁴ Consumer education: a strategy and framework - http://www.offt.gov.uk/shared_offt/consumer_education/oft753.pdf

⁵ Adult Financial Capability Framework. - <http://shop.niace.org.uk/adult-financial-capability-download.html>

- managing money
- planning ahead
- making choices
- getting help

The two perspectives work together. As the researchers commented,

'[Consumers] perceive financial capability in terms of behaviour: what people do and what they should be capable of doing. This behaviour, however, involves knowledge, understanding, skills of various kinds, and the confidence to use them as and when required.'

Knowledge, skills and attitudes are what people bring to a financial issue. The domains set out what they should be able to do. These two dimensions of capability are just different ways of looking at the same thing. The abilities perspective - skills knowledge and attitudes - is helpful when thinking about the individual and what they need to learn. Domains give a measure of what people are able to achieve.

A modified version of the four domains was used for the questionnaire for the FSA's full national survey into financial capability which was conducted between June and September 2005. A total of 5,328 people were interviewed. Detailed information was gathered about the respondents' personal circumstances in order to identify which groups had better and worse levels of financial capability.

The survey identified the strengths and weaknesses that people bring to financial issues and the types of people who display the higher and lower levels of capability, particularly those at risk as a result of particularly low levels of capability.

The results have guided subsequent work on financial capability, identifying key clusters of people in need of support and specific areas of weakness. Notably it showed that people can be quite capable in one area but lack ability in others.

The preliminary research⁶ and the results of the survey⁷ are available on the FSA website. In particular, pages 1-26 of the preliminary research sets out the detailed thinking which led to the survey questions and is well worth reading.

Does the capabilities approach work for civil law?

The capabilities approach of knowledge, skills and attitudes clearly has relevance in a civil law context. To explore it further, Plenet developed an exercise to see how well the capabilities approach works within a legal context and ran it at a number of events at the end of '08 and into '09.

The exercise was run at the PLE conference in Cardiff; at workshops at the Law Centres Federation and ASA conferences, at a Civil Justice Council conference for the judiciary and at a conference in Edinburgh looking at Scotland's need for PLE.

We asked what capabilities do people need to be able to deal with law-related issues? What knowledge do they need? What skills do they require? What attitudes should they have?

⁶ Measuring financial capability: an exploratory study - FSA Consumer Research 37
- <http://www.fsa.gov.uk/pubs/consumer-research/crpr37.pdf>

⁷ Levels of Financial Capability in the UK: Results of a baseline survey - FSA Consumer Research 47
- <http://www.fsa.gov.uk/pubs/consumer-research/crpr47.pdf>

We asked participants to look at two scenarios:

* Darren works for a leading bank. He is to be redeployed to another department as a result of the economic situation. This involves moving to a significantly different job with reduced opportunities for career development. Darren has never got on with his boss and believes he is being discriminated against.

What capabilities will Darren need in order to deal with this situation?

* Amina is nineteen years old and in her first job. She wants to leave home and move into a flat which she will share with two girlfriends. The three of them are about to start the search for a flat to rent.

What 'law-related' capabilities will Amina need to manage this stage in her life?

Despite the wide range of participants the answers we got back were very consistent.

Darren needs knowledge of discrimination law in order to understand whether it applies to him. He also needs the skills to handle some very difficult conversations with his boss and the emotional strength to keep calm in a very stressful situation.

Amina's situation is less clear cut as she doesn't have a specific problem. But she needs to know about her rights as a tenant in order to deal with a lease/tenancy agreement and deposit. She, and her flatmates, need to be clear on their individual responsibilities and be able to plan ahead to manage the rent and utility bills and keep track of payments.

The consensus on **knowledge** was that people need to:

- * Be aware of civil law and recognise legal issues
- * Know where to find out more
- * Understand the issues
- * Know the routes to a solution
- * Know where to go to get help

The **skills** required are the ability to:

- * Communicate effectively
- * Make decisions
- * Plan ahead
- * Keep track of calls and correspondence

The **attitudes** needed are:

- Confidence
- Determination
- Belief in the process
- Detachment

Our conclusion is that the troika of knowledge, skills and attitudes does work for legal issues and provides a useful conceptual framework to guide our PLE work.

Measuring Young People's Legal Capability

Independent Academic Research Studies (IARS) adopted this approach to provide the basis of the research work⁸, commissioned by Plenet, to measure young people's capability.

The capabilities framework worked very well and the research produced useful insights into significant gaps in the capabilities of the young people surveyed.

The IARS research also refined the model, suggested domains⁹ of what young people should be able to do.

Knowing rights and remedies – This is a basic knowledge of legal entitlements and processes, which would enable the young person to spot that they are dealing with a law-related issue and help them decide an appropriate service to approach for help if required.

Spotting a legal issue – From the research it was clear that knowledge of rights and remedies was linked to the skill of spotting a legal issue. A young person not able to spot that they are dealing with a law-related issue would most likely not take any appropriate action to resolve the problem.

Knowing where to go for help – Knowing the appropriate places to seek help is linked with knowing rights and remedies. For instance, a young person who knows that they have a consumer-related problem would be able to approach a relevant agency for advice/information. This domain would also incorporate the ability to use resources effectively, such as using internet search engines.

Planning how to resolve the issue – This would involve a young person knowing not only their rights and remedies but the practical steps they are required to take to resolve the issue.

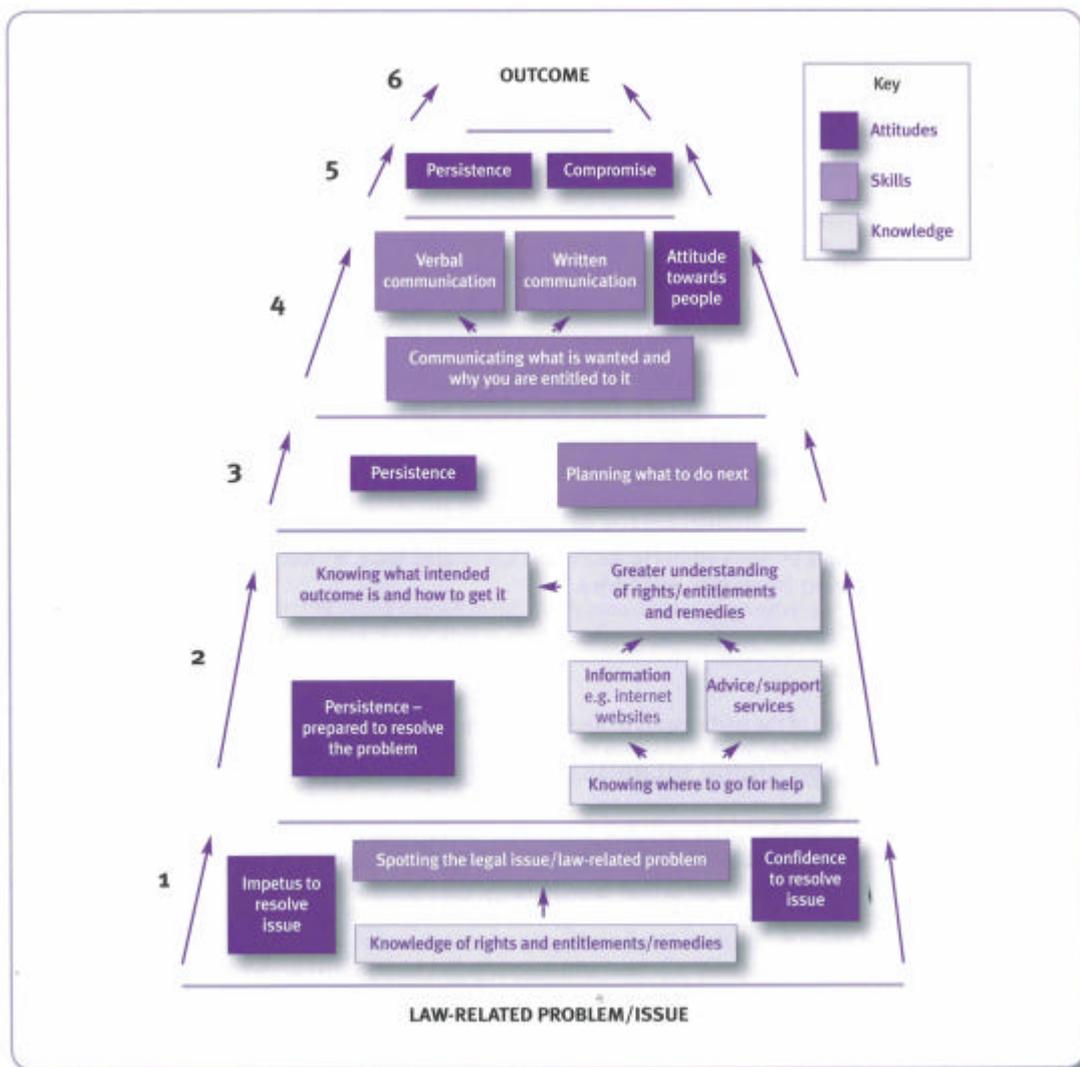
Communicating effectively – It was clear that the ability to communicate verbally and in writing was lacking amongst the young people who took part in this project. It was clear that being able to communicate effectively was linked to being able to manage emotions, and in particular, anger.

Managing emotions – Many of the young people in this study would react aggressively if dealing with certain law-related issues. Being able to manage their aggression and anger would enable them to communicate more effectively.

⁸ Measuring Young People's Legal Capability 2009 - <http://www.plenet.org.uk/research-and-theory/key-reading/measuring-young-peoples-legal-capability.10135.FP.html>

⁹ Ibid page 39.

The IARS report also includes a useful diagram illustrating the interrelationship of the various elements.



What should a legally capable person be able to do?

The four FSA domains provides us with a starting point when thinking about what people need to be able to do on law-related issues, but they don't match as well as the three capabilities of knowledge, skills and attitudes, and so need to be reworked.

It's significant that FSA domains emerged as a result of consultation with a wide range of people, and a similar exercise is probably necessary to achieve the same clarity on law related issues. This work would provide the basis for a wider survey to identify areas of specific need for PLE - particularly which groups of people are at risk as a result of low levels of capability.

An outline of legal capability domains

What follows is offered as a starting point for further discussion. It aims to break down the range of things that a legally capable person should be able to do into distinct areas, drawing on the FSA research and the IARS work.

A legally capable person should be able to:

Recognise and react
Find information and help
Manage and plan
Be an active citizen

These would encompass the following elements:

Recognise and react

- Awareness of legal aspects of life events
- Confidence in the law
- Knowledge of details and routes to a solution
- Develop the impetus to act

Find information and help

- Know where to find more information
- Know what services are available and how to use them
- Have confidence and trust in sources of help
- To be self-confident and self-reliant but know when to get help

Manage and plan

- Understand process and procedures
- Identify and avoid risks
- Be able to communicate
- Plan ahead
- Be able to make decisions
- Keep track of contacts and correspondence
- Manage relationships and negotiate
- Be reasonably detached and realistic
- Keep calm and manage emotions
- Be motivated to act and be persistent

Active citizenship

- Understand the role of law in society
- Engage in critical thinking and participate in debate on law-related issues
- Participate in community based law-related activities

There are lots of ways to slice this cake - and a clear need for more work to develop a framework to underpin research and guide PLE initiatives.

Steps to capability

The legal landscape is dominated by problems, things like consumer problems, housing issues, difficulties at work, family problems etc. issues that most people will face at some point in their lives.

These problems are more common than most people think. The Legal Service Research Centre's 2004 English and Welsh Civil and Social Justice Survey shows that 33% of respondents had experienced one or more justiciable problems in the three and half year

period of the survey. Recent analysis¹⁰ of the survey data shows that each year 16-24 year olds will experience at least 2.3 million rights-related problems requiring advice.

But most people don't like to think about the law, indeed many people will avoid the law and some, particularly those from disadvantaged groups, will see it as something to fear.

There are several reasons for these negative attitudes. First of all, the law involves issues which are bad news - problems, disputes and conflict. There's a natural reluctance to think about these things.

There is also very widespread confusion between criminal and civil law with many people ignorant of the existence of civil law and not aware of it as something they can use to deal with disputes. Individuals who have had contact with the criminal justice system are likely to see the law as more of a threat than something that can help resolve their difficulties.

The episodic nature of law-related problems is a key factor. Although law-related issues are commonplace they occur periodically, often around key life events that are separated in time. As a result most people, most of the time, don't feel they need to think about the law. Instead they wait until a problem occurs and then try to acquire the knowledge needed to deal with it.

Just-in-time learning

Educationalists have jargon for the approach of acquiring knowledge at the last minute. They call it just-in-time-learning, borrowing the concept from just-in-time inventory management in manufacturing, where raw materials and components are delivered from the supplier just before they are needed in order to avoid the high cost of stockpiling. Just-in-time learning avoids the need to hold detailed knowledge that may never be used and is a not an unreasonable way of dealing with unexpected events.

If we acknowledge that most people operate in this way, the key issue is the base level of capability required in order for people to be able to respond effectively. In other words, what is the necessary foundation of capabilities that are needed in order for just-in-time learning to take place?

Step 1 - the foundation level

My hypothesis is that this minimal, floor level of capability should equip everyone to:

- recognise the role of law in everyday situations;
- know where to find out more and get help;
- communicate effectively and confidently, and
- be an active citizen.

Recognition

Fundamentally, people need to be able to recognise when a problem has a legal component. This means having an awareness of civil law and rights and some belief that the system is going to be of help to them. They also need to have sufficient legal consciousness to be able to avoid risks, to be able to plan and make decisions that can help avoid problems in the first place. Recognition provides the starting point to knowing where to get help. It points to where to look for further information and to the type of agency which can provide help and advice.

Getting help

Knowing where to find out more and where to get expert help is essential knowledge. We should expect all citizens to have an awareness of where to find out more and what advice and legal services are available and how to use them. We want to support and encourage

¹⁰ The Advice Needs of Young People - the Evidence, James Kenrick, Youth Access, 2009

self-reliance but a key component of self-reliance is the ability to recognise when a problem is so complex and damaging that it can't be dealt with on a self-help basis and expert help is required.

Communication

People also need to be able to communicate effectively, particularly with the person or institution they are in conflict with. The way that early communication is handled can have a major impact on the final outcome. The skills and confidence needed to do this are not particular to law-related issues; they are important in many areas of life, but communicating in a dispute situation is particularly challenging. Many people learn these skills in a fairly haphazard way through trial and error and an improved base level of these skills would have a major impact on the early resolution of law-related problems.

But the foundation level of capability isn't just about problems.

Citizenship

The ability to be an active citizen is also a part of the foundation level of capability. It means understanding the role of law in society, including civil law. It includes issues around ethics and the law and the tensions between them. And crucially it includes an understanding that laws can be improved and changed, together with the confidence and a belief that, in a democratic society, they can participate in that process.

A bare minimum?

These four areas combine to make up the foundation level and are the bare minimum that we would expect. No doubt there will be suggestions to add more - but this is a level we seek to achieve for the whole population and so there is a need to be realistic.

Step 2 - the problem level

The foundation level equips people to avoid and respond to problems and provides the basis on which a response can be built. This response and the learning it involves takes people to a higher level of capability - the problem level.

The problem level requires more detailed knowledge of specific laws and processes, the use of self-help guides, decision making, being able to find and use advice and legal services. Advicenow's 'Seven Steps' guide¹¹ is an example of a generic approach to this level of capability.

The 'problem level' is the main focus of much PLE work, particularly the information provision undertaken by the advice and legal sector and by government. The bulk of law-related information on websites and in paper form is geared to delivering information at the point at which a problem has been recognised, providing information on the law, and signposting to sources of further help. This material does a reasonable job although there is room for improvement, particularly in supporting the development of skills and confidence.

It seems to me to be important to recognise that the development of legal capability will involve this two-step approach. PLE needs to be tailored to the needs of the audience: someone without a problem is in a very different situation and has different needs than someone in a crisis.

Advice and legal services necessarily focus on problems and have a lot of expertise in this area of work. They do undertake information and education work in their local communities but are often less familiar with effective techniques around prevention and early intervention and so can gain from the insights afforded by the capability approach and particularly the need to address foundation capability.

¹¹ www.advicenow.org.uk/sevensteps

The education world is well positioned to address the foundation level and there is great potential to use this approach to fill the gaps that currently exist.

There is a real opportunity to use the capabilities approach to inform the citizenship curriculum in schools and to develop and extend learning around civil law in adult education.

The capabilities approach provides a way of combining learning about the role of law with the development of the practical skills and knowledge that are needed to deal with the vicissitudes of everyday life. An increased focus on civil law and skills would increase awareness of civil law, aid recognition and equip young people to better deal with the law-related problems they are likely to face later in life.

Conclusions

The conceptual model of legal capability provides us with a powerful tool to guide our PLE work. It delivers greater precision in identifying the knowledge, skills and attitudes that people require in order to deal with law-related issues and sets out what they should be able to do as a result

The legal capability approach is intrinsically empowering. The focus is on the user and what they need in order to manage the law-related problems of everyday life. It directly addresses unnecessary helplessness and equips people to deal with a hostile world.

Capability will differ from person to person. For some, increased capability means being able to deal with a problem successfully themselves, particularly in the early stages. For others it is being able to recognise the serious nature of an issue and quickly locate a source of legal help. The IARS report noted the uneven nature of capability. Some individuals recognise the legal nature of a problem but lack the confidence to do anything about it. Others are persistent and talented negotiators but have no awareness of civil law.

There is need for further research to identify gaps in capability particularly where low levels of capability put particular groups at risk. This data would be invaluable in the further development of PLE. The FSA survey provides a blueprint and we need to develop our own plans to replicate this work to set a baseline of current legal capability.

The concept of legal capability broadens our approach to the law beyond legal literacy and emphasises the skills and attitudes needed to use the law. This brings significant benefits to citizens and also breaks down barriers to educators, community development staff, youth workers, and others who can contribute to the development of legal capability.

In particular it clarifies objectives for educators. The foundation level of capability is less about intricate knowledge of the law and more about basic and practical knowledge and skills that can help us all deal with the common problems of everyday life.

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